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PAGE 01 GENEVA 09534 01 OF 04 221848Z
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E.O. 11652
TAGS: ETRD, MTN
SUBJECT: DRAFT INTEGRATED TEXT ON SAFEGUARDS: HIGHLIGHTS
OF DRAFTING CHANGES

REF: GENEVA 9199

1. FOLLOWING PARAGRAPHS SUMMARIZE DEVELOPMENTS DURING
SAFEGUARDS DRAFTING SESSIONS JUNE 8, 9, 12, 14, AND 15.
FINAL PARAGRAPH NOTES SOME KEY ISSUES WHERE NEW GUIDANCE
ASAP WOULD BE USEFUL.

2. GENERAL PROVISIONS. NO CHANGE TO TEXT. BOTH JAPAN
AND EC QUESTIONED REQUIREMENT THAT ALL SAFEGUARD ACTIONS
BE TAKEN THROUGH "INVOCATION OF ARTICLE XIX" ARGUING THAT
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PAGE 02 GENEVA 09534 01 OF 04 221848Z

IF MEASURES COVERED BY CODE ARE TAKEN AND MUST ACCORD
WITH ITS PROVISIONS, A REQUIREMENT FOR FORMAL INVOCATION
OF XIX IS UNNECESSARY (IF NOT IMPROPER IN CASES OF
EXPORT RESTRAINTS). WE ACKNOWLEDGED VER'S TECHNICALLY
NOT COVERED BY XIX PROVISIONS FOR IMPORT ACTION, BUT
SAID THAT SUCH MEASURES LOGICALLY FELL UNDER ARTICLE XIX
WHEN TAKEN TO PREVENT OR REMEDY IMPORT-INJURY. INVOCATION

OF XIX FOR LEGITIMATE SAFEGUARD MEASURES WAS KEY ELEMENT FOR CODE, BUT OF COURSE IT SHOULD BE FORMULATED TO ACCORD WITH CODE PROVISIONS ON COVERAGE. NORDICS CLOSED THAT DISCUSSION WITH FIRM STATEMENT THAT WITHOUT PROVISIONS COVERING OMA/EXPORT RESTRAINTS, CODE WOULD BE UNACCEPTABLE.

3. CHAPTER 1, CRITERIA FOR INVOCATION. SOME EDITORIAL CHANGES, EXPLANATORY NOTES, AND ELIMINATION OF REDUNDANT LANGUAGE. WE MET MUCH RESISTANCE TO PROPOSED DELETION OF "A MAJOR PART OF ALL" AS THE BASIC THRESHOLD DEFINING DOMESTIC PRODUCERS--A PHRASE WE TERMED "INTOLERABLY RESTRICTIVE" FROM THE U.S. STANDPOINT. EC SUGGESTED WORD "SIGNIFICANT" AS ALTERNATIVE MODIFIER WHICH WE SAID (WITHOUT ACCEPTING) WAS MORE REASONABLE. FOLLOWING JAPAN, CANADA, AND NORDIC ENDORSEMENT OF "MAJOR PART" BOTH TERMS WERE BRACKETED. DISCUSSION OF REGIONAL ISSUE ALSO RESULTED IN FOOTNOTE SUGGESTING THAT SOMETHING LIKE ANTIDUMPING CODE REGIONAL PROVISION (4(A)(II)) BE ADDED IN. DELS ALSO REACTED SHARPLY TO U.S. REJECTION OF EC'S IMPORT INJURY LINK, "PRINCIPAL CAUSE". ALL EXCEPT AUSTRALIA (WHICH IN CONTRAST TO EARLIER POSITION SUPPORTING U.S. HAD NO VIEWS ON SUBJECT) EXPRESSED PREFERENCE FOR HIGHER THRESHOLD THAN U.S. TRADE ACT TERM "SUBSTANTIAL CAUSE" AND APPEARED SOMEWHAT PIQUED BY U.S. REP (HARTZELL) STATEMENT THAT PROSPECTS FOR AMENDING U.S. LAW ON THIS POINT WERE EXTREMELY REMOTE. CANADA, SWITZERLAND, AND LIMITED OFFICIAL USE

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PAGE 03 GENEVA 09534 01 OF 04 221848Z

NORDICS COULD ACCEPT ARTICLE XIX LANGUAGE AS ALTERNATIVE (WHICH IS UNQUALIFIED) BUT SAID PROBLEM IS THAT OBJECTIONABLE LANGUAGE OF TRADE ACT WOULD REMAIN.

4. ON CHAPTER 2, CONDITIONS. NO MAJOR CHANGES. DISCUSSION CENTERED ON TIME LIMITS FOR SAFEGUARD ACTION. DRAWING FROM INSTRUCTIONS, WE NOTED U.S. PREFERENCE FOR TRADE ACT FORMULATION (5-YEAR MAXIMUM WITH ONE 3-YEAR EXTENSION). FOLLOWING ANTICIPATED REJECTION OF THESE LIMITS BY OTHERS, WE STATED AS COMPROMISE COULD ACCEPT UNSTIPULATED MAXIMUM PERIOD. AS A NEW ALTERNATIVE, EC REP (ABBOTT) FLOATED IDEA, ENDORSED BY NORDICS, OF SHORTER INITIAL MAXIMUM PERIOD (12-24 MONTHS) WITH FLEXIBLE PROVISION FOR EXTENSIONS (LINKED TO TIGHT MULTILATERAL REVIEW). EC SUGGESTED ALLOWING OPTION OF USING EITHER ITS APPROACH OR U.S. PROPOSAL FOR 5-YEAR MAXIMUM PERIOD PLUS EXTENSION; WE ENCOURAGED EC TO SUBMIT TEXT ON THIS POINT, DESCRIBING THEIR IDEA AS WORTH EXPLORING BUT VERY BURDENSOME FOR U.S. UNDER ITS USUAL PROCEDURES. CANADIANS OFFERED "BRIDGING" PROPOSAL--WHICH NOW APPEARS IN TEXT IN PLACE OF ALL OTHER ALTERNATIVES--FOR STIPULATED INITIAL PERIOD OF APPLICATION WITH PROVISION CREATING SPECIFIED

LIMIT ON TOTAL OF INITIAL PERIOD PLUS EXTENSIONS (AN IDEA JAPAN SAID IT WAS WILLING TO PURSUE ADDING HOWEVER THAT THE SHORTER THE MAXIMUM PERIOD THE BETTER).

5. NORDIC REP (EKBLOM) SAID HE FELT "SOCIAL CLAUSE" PROPOSAL HAD PROVED A NON-STARTER FOR NOW AMONG DCS AND THAT WITHOUT THEIR SUPPORT HE COULD NOT PERMIT DISTRIBUTION OF PROPOSAL TO LDCS. CONSEQUENTLY, PROPOSAL WAS WITHDRAWN THOUGH, AS EKBLOM NOTED, "NOT ABANDONED". WITHOUT ENCOURAGING REVERSAL OF THIS DECISION, THE EC, JAPAN, AND U.S. EACH EXPRESSED THEIR INTEREST IN CONCEPT ITSELF BUT SAID IMPLICATIONS OF PROPOSAL IN OPERATIONAL SENSE WERE VERY FUZZY. EKBLOM DID NOT DISAGREE.

6. CHAPTER 3, RESPONSES TO SAFEGUARD ACTION. EXPANSION LIMITED OFFICIAL USE

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PAGE 04 GENEVA 09534 01 OF 04 221848Z

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PAGE 01 GENEVA 09534 02 OF 04 221858Z
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OF ALTERNATIVE I, COMPLETE REWRITE OF ALTERNATIVE II.
JAPAN SAID ITS POSITION COULD BE COVERED BY ADDITION OF

BRACKETED NEW FIRST SENTENCE MAINTAINING RETALIATION RIGHTS UNDER ARTICLE XIX:3(A) AND ALTERNATIVE PROVISION THAT EXPORTER "MAY" (RATHER THAN "SHALL")REFRAIN FROM RETALIATION IF IT AGREES REQUIREMENTS OF AGREEMENT ARE MET. CANADIAN DEL (WEEKES) OFFERED SHORTENED VERSION OF ITS TEXT WHICH DELS AGREED WAS MORE READABLE BUT EVEN IN REDRAFTED FORM REMAINS COMPLICATED AND SOMEWHAT CONFUSING. WE NOTED THAT WHILE WE FIND CANADIAN APPROACH CONCEPTUALLY LOGICAL, OPERATIONALLY IT COULD PROVE EXTREMELY DIFFICULT TO ADMINISTER PARTICULARLY WHEN ATTEMPTING TO DISTINGUISH BETWEEN TWO LEVELS OF RETALIATION AND BALANCING DAMAGE ESTIMATES AND COUNTER-ACTIONS. MOREOVER, THE INCENTIVE TO ADHERE TO CODE PROCEDURES AND CONDITIONS COULD BE DIMINISHED IF RETALIATION IS OPEN TO SIGNATORIES WHETHER OR NOT THEY PLAY BY THE RULES.

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PAGE 02 GENEVA 09534 02 OF 04 221858Z

7. CHAPTER 4, NATURE OF SAFEGUARD ACTION. NEW DRAFT OFFERED BY U.S., EC, AND JAPAN ON JUNE 13 COMBINING TEXT FROM U.S. (TPSC 78-68), JAPAN (NEW VERSION JUNE 9), AND PARTIAL EC TEXTS IMPROVISED BY ABBOTT. ON JUNE 14 DRAFT WAS INTRODUCED TO GROUP FOR DISCUSSION AS UNCLEARED UNOFFICIAL PAPER OFFERED WITHOUT COMMITMENT AND DESIGNED SOLELY TO IDENTIFY IN TEXT FORMAT AREAS OF CONVERGENCE AND DISAGREEMENT. U.S. REP NOTED THAT ALTHOUGH VIEWS ARE PRESENTED IN SINGLE TEXT THE VARIOUS ROUTES FOR TAKING SELECTIVE ACTION WERE PRESENTLY SEEN AS QUITE DIFFERENT, BOTH PROCEDURALLY AND SUBSTANTIVELY DISTINCT, ALTHOUGH PERHAPS CONVERGING SOMEWHAT. SWITZERLAND, NORDICS, AUSTRALIA, AND CANADA, WHICH HAD RECEIVED THE DRAFT LESS THAN 24 HOURS BEFORE THE MEETING, OFFERED NO DEFINITIVE REACTIONS. HOWEVER, ALL EXCEPT AUSTRALIA OBJECTED TO U.S. OPPOSITION TO SOME DEFINITION OF "UNUSUAL AND EXCEPTIONAL CIRCUMSTANCES" AND OUR RESISTENCE TO ANY SPECIFICATION OF GUIDELINES FOR COMMITTEE REVIEW OF WHETHER SELECTIVITY WARRANTED. SWITZERLAND OBSERVED IT DID AGREE WITH MOST ELEMENTS OF DRAFT AND COULD ACCEPT IT AS BASIS FOR FURTHER NEGOTIATIONS. NORDICS SAID IF REFERENCE IN PARA. 1 TO "IN GENERAL" AND "ON A GLOBAL BASIS," AND IN PARA. 2 TO "UNUSUAL AND EXCEPTIONAL CIRCUMSTANCES," WERE BRACKETED THEY COULD ACCEPT DRAFT AS IS. NORDICS PRESSED GROUP TO ACCEPT ABOVE AMENDMENTS BUT BACKED DOWN AFTER MUCH RESISTANCE AND THREATS OF "BALANCING" ADDITIONS FROM JAPAN, SWITZERLAND, AND CANADA. ALL AGREED THAT TEXT WOULD BE PRESENTED AS "NOT REFLECTING VIEWS OF ALL DELEGATIONS" TO COVER BOTH DISSATISFACTIONS AND LACK OF TIME FOR REVIEW.

8. CHAPTER 4 BIS, USE OF EXPORT RESTRAINTS. BRACKETED TEXT AS PROPOSED BY U.S. WE ACCEDED TO JAPANESE REP'S

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PAGE 03 GENEVA 09534 02 OF 04 221858Z

REQUEST TO BRACKET CHAPTER TITLE AS WELL AS TEXT IN ORDER, HE SAID, TO AVOID UPSETTING DISCUSSION AND REVIEW OF POSSIBLE TEXT ON SUBJECT CURRENTLY UNDERWAY IN TOKYO. WE POINTED OUT THAT WHILE WE APPRECIATE JAPANESE SENSITIVITIES AND WOULD HELP MAKE DRAFT EASIER PRESENTATIONALLY, WE ARE ADAMANT THAT EXPORT RESTRAINTS BE ADEQUATELY DEALT WITH IN SAFEGUARDS CODE. WHILE DELS DID NOT ENGAGE IN SUBSTANTIVE DISCUSSION OF THIS POINT, SWITZERLAND, NORDICS AND CANADA DID RECALL THEIR VIEW THAT ALL MEASURES TAKEN FOR SAFEGUARD PURPOSES SHOULD BE MADE SUBJECT TO CODE DISCIPLINE.

9. CHAPTER 5, NOTIFICATION, CONSULTATION. SUBSTANTIAL RESTRUCTURING, NO MAJOR SUBSTANTIVE CHANGES. DELS AIMED CHIEFLY AT CLARIFYING TEXT, REFINING IT INTO MORE MANAGEABLE FORMAT. SIGNIFICANT ADDITION (THOUGH IN BRACKETS) IS FREE STANDING CONSULTATION PROVISION ALONG LINES OF ARTICLE XXII:1 WHICH WOULD PERMIT BILATERAL CONSULTATIONS ON ANY MATTER WHETHER OR NOT RELATED TO SPECIFIC SAFEGUARD ACTION; EC RESERVED ON PROVISION BUT NOTED THAT SINCE SUCH RIGHTS ARE ALREADY AVAILABLE UNDER XXII NO NEW SUBSTANTIVE OBLIGATIONS ARE CREATED. EC DISTINGUISHED ITS LANGUAGE PERMITTING PROVISIONAL ACTION WHERE DELAY IN CONSULTATIONS ALREADY OFFERED OR ALREADY BEGUN LEADS TO "DAMAGE DIFFICULT TO REPAIR", FROM LANGUAGE IN ARTICLE XIX "CRITICAL CIRCUMSTANCES" WHERE ACTION TAKEN WITHOUT OFFER OF PRIOR CONSULTATION. U.S., CANADA, AND NORDICS EACH PRESSED EC TO WITHDRAW PARAGRAPH ON PROVISIONAL ACTION NOTING CONFUSION CREATED BY USE OF XIX:3(B) LANGUAGE ("DAMAGE DIFFICULT TO REPAIR") AND POINTING OUT THAT COUNTRIES ALREADY MAY ACT (AND USUALLY DO) BEFORE CONSULTATIONS ARE COMPLETED. EC INSISTED ON RETAINING LANGUAGE BUT DID AGREE TO CHANGE "PROVISIONALLY" TO "ON AN INTERIM BASIS".

10. CHAPTER 6, SURVEILLANCE, DISPUTE SETTLEMENT. SOME LIMITED OFFICIAL USE

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PAGE 04 GENEVA 09534 02 OF 04 221858Z

MINOR REFINEMENTS, WITH FOCUS MAINLY ON CANADIAN TEXT (ALTERNATIVE II) WHICH EC STILL REJECTS AS BEING "FAR TOO DETAILED". EC SUGGESTED, HOWEVER, CANADIAN TEXT COULD BE MADE 'MORE ACCEPTABLE' IF THE FOLLOWING MODIFI-

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PAGE 01 GENEVA 09534 03 OF 04 221907Z
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CATIONS ARE MADE: CLARIFY THAT PANELS ARE ESTABLISHED
ON A CASE-BY-CASE BASIS AND WOULD NOT BE CONSTITUTED AS
STANDING BODY; SOFTEN LANGUAGE IN FIRST SENTENCE PARA. 10
WHICH AS PRESENTLY WORDED OBLIGATES SIGNATORIES TO MODIFY
OR TERMINATE ACTIONS FOUND NOT TO BE IN CONFORMITY WITH
CODE CRITERIA AND CONDITIONS; MAKE CLEAR THAT COMMITTEE
OF SIGNATORIES, NOT PANELS, HANDLE RETALIATION QUESTION
(BOTH AS TO AUTHORIZATION AND LEVELS). CANADA SAID THEY
PROBABLY COULD ACCOMMODATE EC ON FIRST TWO POINTS BUT ON
THIRD POINT FELT STRONGLY THAT PANELS SHOULD BE PERMITTED
TO CONSIDER BOTH WHETHER RETALIATION IS WARRANTED AND
LEVELS OF RETALIATION THOUGH IT CONCEDED COMMITTEE NEED
NOT FOLLOW PANEL VIEWS. CANADA NOTED IT WOULD REVISE
TEXT ONLY IF EC RECIPROCATED BY REMOVING ITS BRACKETS--
THIS EC PROMPTLY REFUSED TO DO WITH THE RESULT THAT TEXT
REMAINS UNCHANGED. THERE WAS LITTLE SPECIFIC DISCUSSION
OF ALTERNATIVE I ALTHOUGH U.S. INSERTED NOTE INTO TEXT
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PAGE 02 GENEVA 09534 03 OF 04 221907Z

STATING THAT A MORE DETAILED STATEMENT OF DISPUTE

SETTLEMENT PROCEDURES, TAKING INTO ACCOUNT THOSE BEING DEVELOPED ELSEWHERE IN MTN, WILL NEED TO BE SPECIFIED.

11. CHAPTER 7, DOMESTIC PROCEDURES. NO CHANGE. U.S. REP PROPOSED THAT BRACKETS BE REMOVED ON AT LEAST PARA. 1 OF U.S. FORMULATION, SINCE IT SEEMED UNOBJECTIONABLE TO ALL DELS. NORDICS SAID THEY COULD ACCEPT U.S. TEXT AS IS BUT CANADA, EC, AND PARTICULARLY JAPAN RAISED A NUMBER OF SEMANTIC PROBLEMS. PRINCIPAL STUMBLING BLOCK WAS JAPANESE DIFFICULTY WITH TERM "GOVERNMENTAL ENTITY" BASED ON VAGUE GROUND THAT JAPANESE CABINET, WHICH MUST AUTHORIZE TARIFF ACTIONS, CANNOT IN A "CONSTITUTIONAL SENSE" BE CONSIDERED AN ENTITY. WE OFFERED TO CHANGE TERM TO "DOMESTIC AUTHORITY" BUT JAPAN STILL BALKED CITING SAME OBSCURE DIFFICULTY. WE SUGGESTED SOME RECONCILIATION WITH BRACKETS OF JAPANESE AND U.S. DOMESTIC PROCEDURE TEXTS MIGHT BE POSSIBLE IN BILATERAL DISCUSSIONS BUT FOR LACK OF TIME AGREED TO LEAVE ALTERNATIVES IN EXISTING FORM.

12. CHAPTER 8, DEVELOPING COUNTRIES. NO CHANGE. WE OFFERED TO WITHDRAW SECOND BRACKETED ALTERNATIVE IN PARAGRAPH 2, AND CANADIANS AGREED TO DROP OVERALL BRACKETS. DELS FINALLY AGREED, HOWEVER, WITH EC SUGGESTION THAT AS TACTICAL MATTER FORMULATION SHOULD REMAIN AS IS SO AS TO SUGGEST TO LDCS THAT DCS NOT EVEN AGREED ON HAVING ANY SPECIAL PROVISIONS FOR LDC BENEFITS (GIVEN REAL LIMITATIONS ON S&D POSSIBILITIES).

13. CHAPTER 9, OTHER PROVISIONS. REMAINS UNCHANGED EXCEPT FOR TRANSFER FROM CHAPTER 5 OF CANADIAN PARAGRAPH ON NOTIFICATION OF DOMESTIC LEGISLATION, REGULATIONS, AND PROCEDURES. , AND
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PAGE 03 GENEVA 09534 03 OF 04 221907Z

14. IN THE LIGHT OF THE ABOVE DEVELOPMENTS, WE RECOMMEND WASHINGTON EXAMINE CLOSELY THE FOLLOWING POINTS, ON WHICH ADDITIONAL GUIDANCE ASAP WOULD BE USEFUL:

A. CHAPTER 1 - WHAT IS WASHINGTON REACTION TO "SIGNIFICANT" IN PLACE OF "MAJOR" AS COMPROMISE ON DEFINING PORTION OF DOMESTIC PRODUCERS WHOSE IMPORT-CAUSED INJURY COULD WARRANT SAFEGUARD ACTION? ALTERNATIVELY (OR ADDITIONALLY), DO WE WANT TO PUSH ANTIDUMPING CODE REGIONAL LANGUAGE? (WE BELIEVE LATTER APPROACH LIKELY TO BE MORE CONSTRAINING FOR U.S., BUT MAY BE NEEDED IF JAPAN WINS ACCEPTANCE OF ITS OTHER ADC BORROWINGS.)

B. CHAPTER 2 - MAJOR QUESTION IS OVERALL TIME LIMIT ON

SAFEGUARD ACTIONS PLUS EXTENSIONS: CAN WE, AS PART OF FINAL ACCEPTABLE PACKAGE, GO WITH SOMETHING LESS THAN TRADE ACT 8-YEAR MAXIMUM (E.G., 6 OR 5 YEARS)? WHAT IS WASHINGTON REACTION TO EC IDEA (PARA. 4 ABOVE) OF A 12-24 MAXIMUM INITIAL LIMIT WITH SOME FLEXIBILITY ON EXTENSIONS? (WE BELIEVE SOMEWHAT SHORTER OVERALL MAXIMUM WOULD NOT BE REAL BURDEN FOR U.S. AND OUGHT TO BE CONSIDERED AS A POSSIBLE BARGAINING CHIP, (EVEN IF IT NECESSITATES TRADE ACT CHANGE), IF IT CAN DEMONSTRABLY HELP TO ACHIEVE BETTER FINAL PACKAGE.)

C. CHAPTER 4 - WE UNDERSTAND NEW APPROACH TO "SELECTIVE" ACTION VIA REINTERPRETATION OF GATT ARTICLE XIII IS UNDER CONSIDERATION. WE REQUEST THAT YOU ALSO REVIEW (AND ELABORATE WHERE POSSIBLE) OPERATIONAL ASPECTS, E.G., (A) HOW WE SHOULD EXPLAIN PROCESS BY WHICH COMMITTEE REVIEWS/"APPROVES" DISAGREED SELECTIVE ACTIONS; (B) WHAT TIME LIMITS COULD BE ENVISAGED ON THAT PROCESS; CAN TIGHTER TIME LIMITS LIMITED OFFICIAL USE

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PAGE 04 GENEVA 09534 03 OF 04 221907Z

FOR REVIEW BE SET FOR "CRITICAL CIRCUMSTANCES" SITUATION; (C) DO WE ENVISAGE "PUNITIVE RETALIATION" FOR SELECTIVE ACTION TAKEN IN FACE OF NEGATIVE COMMITTEE JUDGMENT; (D) CAN U.S. ENVISAGE (IN

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PAGE 01 GENEVA 09534 04 OF 04 221908Z
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LIGHT OF NEAR UNANIMOUS OPPOSITION TO OUR PRESENT
POSITION) SOME GUIDELINES OR THRESHOLD DEFINITIONS
FOR SELECTIVE ACTION TO BE USED BY COMMITTEE IN
REVIEWING DISAGREEMENTS.

D. CHAPTER 4 BIS - WE WILL NEED RAPID REACTION TO
JAPANESE TEXT IF AND WHEN IT APPEARS.

E. CHAPTER 5 - WOULD A "FREE-STANDING" CONSULTATION
PROVISION (NEW BRACKETED PARA. 10) ULTIMATELY
SUFFICE IN MEETING OUR OBJECTIVE OF CONSULTATION
RIGHTS FOR THIRD PARTIES EXPERIENCING (OR FEARING)
TRADE DIVERSION? (WE THINK ANSWER COULD BE "YES"
IF ADEQUATE NOTIFICATION PROVISIONS ARE SECURED.)

F. CHAPTER 6 - IS THERE A BASIS FOR RECONCILING THE
THREE ALTERNATIVES ON PARAGRAPH 3 DEALING WITH
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PAGE 02 GENEVA 09534 04 OF 04 221908Z

RELATIONSHIP OF CODE DISPUTES PROCEDURE TO ARTICLES
XXII/XXIII? (FOR EXAMPLE: A REQUIREMENT THAT CODE
PROCEDURES BE EXHAUSTED FIRST BEFORE ANY ATTEMPT TO
USE XXII/XXIII.) THIS WOULD SET A GUIDELINE FOR
THE REST OF CHAPTER 6 PROVISIONS. WHAT ARE OUR
SPECIFIC OBJECTIONS TO THE CANADIAN ALTERNATIVE OF
DELEGATING CPS' FUNCTIONS TO THE COMMITTEE?

G. CHAPTER 9 - WILL U.S. BE PROPOSING "PROVISIONS
GOVERNING THE USE OF AUTOMATIC LICENSING AND
SIMILAR SURVEILLANCE MEASURES FOR SAFEGUARDS-
RELATED PURPOSES"?

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Status: NATIVE
Subject: DRAFT INTEGRATED TEXT ON SAFEGUARDS: HIGHLIGHTS OF DRAFTING CHANGES
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